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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. UBALDO SANCHEZ, Defendant and Appellant.	H040503 (Monterey County Super. Ct. No. SSC120001A)

On May 17, 1982, the body of Manuel Pesqueira Sandoval was found near a cluster of worker housing at Rancho Lejos[1] in southern Monterey County. Sandoval had been shot in the chest at close range with a shotgun.

In 2013,[2] defendant Ubaldo Sanchez was convicted by a jury of first degree murder. (Pen. Code, § 187, subd. (a).)[3] The jury also found true the allegation that Sanchez personally used a firearm, specifically a shotgun, when he killed Sandoval. (§ 12022.5, subd. (a).)

On December 13, 2013, the court sentenced Sanchez to a term of 25 years to life for the murder along with a consecutive term of two years for the firearm enhancement

[1] Rancho Lejos was also referred to as Deerwood Stock Farm.

[2] The People assert, without citation to the record, that "[l]aw enforcement investigators actively looked for [Sanchez] as a suspect in the homicide in 1982. Until 2008, however, the investigation was dormant." We mention this only because the parties have otherwise failed to explain the delay between Sandoval's death in 1982 and Sanchez's conviction in 2013.

[3] Unspecified statutory references are to the Penal Code.

for a total term of 27 years to life. The trial court imposed a restitution fine of $4,000 under section 1202.4, subdivision (b), and victim restitution in an amount to be determined by the probation department under section 1202.4, subdivision (f). The court imposed an additional restitution fine of $4,000 under section 1202.45 but ordered that fine suspended pending successful completion of parole, if any.

On appeal, Sanchez argues the trial court committed multiple evidentiary errors, specifically: (1) admitting evidence of incriminating hearsay statements made in Sanchez's presence as adoptive admissions; (2) admitting evidence of a prior uncharged incident in which Sanchez threatened someone with a knife; (3) admitting testimony that Sanchez, in an ongoing family dispute, had threatened to kill the family members involved; (4) admitting the statements he made to investigating officers; and (5) admitting expert testimony by a witness regarding time of death. In connection with these claimed evidentiary errors, Sanchez also argues his trial counsel was ineffective and that his due process rights were violated. Sanchez further argues the trial court erred in refusing to either set aside the verdict against him or grant him a new trial after the prosecution belatedly disclosed that a witness had prior misdemeanor convictions for crimes of moral turpitude. Finally, Sanchez challenges the restitution fines and direct victim restitution imposed under sections 1202.4 and 1202.45.

We find no merit to any of Sanchez's arguments relating to his trial and conviction, but agree that the trial court improperly imposed a restitution fine and direct victim restitution under section 1202.4, subdivisions (b) and (f), as well as the restitution fine imposed but suspended under section 1202.45 as neither of those statutes were in effect at the time of the underlying offense. Accordingly, we will reverse and remand to allow the trial court to consider whether to impose a restitution fine under the law in effect at the time of the offense, specifically former Government Code section 13967, subdivision (a). (Stats. 1981, ch. 102, § 54, p. 710.)

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution's case

1. Jose Munoz's testimony

In May 1982, Jose Munoz was living and working at Cuidado Ranch, but had previously lived and worked with Sandoval at Ranchos Lejos. On the Saturday before Sandoval died, Munoz drove to a bar in Avenal with Sandoval and a third man who worked with Sandoval. Munoz could not remember the name of the third man, but recalled the man was shorter than Sandoval. At the bar, Munoz met up with some other friends. He did not know if Sandoval and the third man were drinking together.

On the ride home, Munoz was driving and Sandoval was in the front passenger seat, with the third man sitting in the back. Sandoval and the other man began arguing. The man told Sandoval, "I'm going to kill you," and Sandoval told Munoz to stop the car. Sandoval climbed into the back seat with the third man and they continued to argue, but there was no physical fight between the two. Munoz thought they argued for about 10 or 15 minutes overall, and Munoz believed the men fell asleep at some point during the drive.

When they arrived at Rancho Lejos, Sandoval and the third man went to their respective homes. Munoz spent the night at Rancho Lejos with his brother-in-law, Cristovol Lovatos. The next day, Munoz saw Sandoval at work.

2. Cristovol's testimony

Cristovol and his brother, Ricardo Lovatos (Ricardo), lived and worked at Rancho Lejos in 1982. Cristovol met Sanchez when he worked at Rancho Lejos, and he met Sanchez's brother, Octavio, when he was invited to a party in San Miguel. Cristovol said Sanchez and Alfredo Briones lived in the same building at Rancho Lejos.

On the day before the killing, a Sunday, Sanchez asked Cristovol and Briones for a ride to a party in San Miguel. After they arrived, Octavio invited Cristovol to stay at the

party, but Cristovol said he left shortly thereafter, without Sanchez. He did not go back to San Miguel that day to pick up Sanchez.

At about 6:30 a.m. the following day, Cristovol testified he started moving his belongings to another residence on the ranch. As he returned, he saw Sanchez, Octavio and a third man by Octavio's car. Octavio asked Cristovol where Sandoval was. Cristovol replied he thought Sandoval was home drunk. He assumed Sandoval was home because he could hear music coming from his room.

Octavio and Sanchez remained by the car while the third man walked behind the building where Sandoval lived. The third man returned and said, "That's it. Let's go." Either Sanchez or Octavio told Cristovol to tell the foreman Sanchez was not going to be at work that day. Cristovol could tell Sanchez had been drinking because his eyes were red and he smelled of alcohol. However, Sanchez was not swaying, spoke clearly and generally seemed aware of his surroundings. The three men got back in the car and left.

At some point after the three men left, Briones told Cristovol that Sandoval was asleep behind the house. Cristovol and Briones went to help Sandoval back to his room. When Cristovol grabbed Sandoval's arm, he realized Sandoval was dead. There was blood on his stomach and his body was very stiff. The evening before, Cristovol had not heard any unusual sounds and he said the ranch was normally quiet at night.

3. Police interviews with Cristovol

Spanish-speaking Deputy Sheriff Luis Alvarez interviewed Cristovol in May 1982. In that interview, Cristovol told Alvarez that he and his "cousin," Ricardo, left on Sunday at about 10:00 a.m. to drive to Paso Robles. On the way back, Cristovol and Ricardo, along with Munoz, stopped in San Miguel at about 1:30 p.m. where they saw Sanchez and some other people in the park. The three men, joined by Sanchez, returned to the ranch where they drank together for a little while. At about 3:00 p.m., Munoz drove Sanchez back to San Miguel, then the two of them returned to the ranch that same afternoon.

Cristovol told Alvarez that Sandoval came by while they were drinking and Sanchez insisted he join them for a beer. Sandoval initially refused, but then stayed to drink one beer before returning to work. After work, Sandoval rejoined the group until about 4:00 p.m. Munoz went home, and Cristovol and Ricardo stayed in their room until they went to sleep.

Alvarez further testified that Cristovol told him he arose at about 5:45 a.m. the next morning and started to walk across the road to a friend's house. As he approached the house, he saw Octavio's car, a Ford Granada, drive up and park in a driveway. Sanchez, Octavio and a third "skinny" man got out of the car. Sanchez and Octavio both looked intoxicated. Sanchez told Cristovol he drank too much the night before, and he asked Cristovol to tell their boss Sanchez would not be at work that day. The three men got back in the car and left.

Cristovol said Ricardo[4] then walked to Sandoval's residence. When Ricardo returned, he told Cristovol he had found Sandoval, so Cristovol went over himself and saw Sandoval's body. Cristovol then walked across the road to where his friend Alberto lived and told Alberto that Sandoval was dead. Alberto went to tell the boss.

By stipulation, portions of Detective Ralph Price's report of his May 17, 1982 interview with Cristovol were read to the jurors. Among the notes Price took were the following: "At around 2:00 on Sunday, 5-16-82, . . . [Sanchez] had returned to the ranch from San Miguel." "The victim Sandoval came in for a break or something, and they had one beer, and then Sandoval had to go back to work." "[Cristovol] said that [Sanchez] then departed the ranch and he didn't see him again until approximately 6:00 [a.m.]."

[4] Alvarez testified he interviewed a man with no identification who identified himself as "Ricardo." Ricardo, who said Cristovol was his cousin, gave Alvarez a similar account as Cristovol, but said he had to tell Cristovol about the body twice.

Also by stipulation, portions of Price's report of his May 18, 1982 interview with Cristovol were read to the jurors. In this report, Price took the following notes: "Around 1400 hours on Sunday [Cristovol] and some friends had been in town in San Miguel. [¶] . . . [T]hey picked up [Sanchez] at the park and brought him home to the residence at [Rancho Lejos]"; "[W]hile they were there . . . Sandoval came in from work, and [Sanchez] invited Sandoval to have a beer, which he did"; "[A]round 1500 hours [Sanchez] departed the ranch for an unknown destination."

4. Ricardo's testimony

Ricardo testified he worked and lived at Rancho Lejos in May 1982, but would sometimes stay with his girlfriend in Paso Robles. Ricardo spent the Sunday night before Sandoval's murder with his girlfriend. On Monday morning, Ricardo was driving back to the ranch and passed a car going in the opposite direction. He saw Sanchez and two other people in that car. When Ricardo arrived at the ranch, Cristovol told him what had happened.

5. Adolfo Campoverde's testimony

In 1982, Adolfo Campoverde was living in a trailer near Rancho Lejos with his brother-in-law, Jose Contreras. Campoverde was close friends with Octavio, and was godfather to Octavio's daughter. Campoverde knew Octavio's brother, Sanchez, though not as well as Octavio.

On a Saturday or Sunday, Campoverde had been at Octavio's home from mid-afternoon until 8:00 or 9:00 that evening. He remembered that Sanchez was there as well. A couple of hours later, Octavio showed up at Campoverde's trailer. Sanchez was there as well, but did not come in. Campoverde talked with Octavio inside the trailer for five or 10 minutes, but did not think Contreras was present during this conversation. Octavio asked for the telephone number of Campoverde's brother-in-law, who lived in Washington State.

6. Contreras' testimony[5]

Contreras confirmed he and Campoverde were living in the same trailer in May 1982. At 1:00 or 2:00 a.m., one morning, Contreras was sleeping when someone knocked on the door. Campoverde opened the door and let Sanchez and Octavio inside. Contreras got up too and stood behind Campoverde. Octavio said, "This guy just killed a mother fucker." Sanchez did not say anything in response, though Contreras thought "he looked like he was under the influence or something." Contreras saw him stumble at least once, though he could walk unassisted. Octavio asked for the telephone number of Contreras' brother "Chaquetas" who lived in Yakima, Washington.

After Octavio and Sanchez left the trailer, Contreras encouraged Campoverde to call the police, but he refused. Campoverde said they needed to "help our fellow country men. [*Sic*.]" When asked why he did not call the police himself, Contreras said he "never learned how to dial on a phone or make a phone call." Contreras also said he did not know how to write or how to drive a car so he could not get to the police station on his own.

On redirect, Contreras testified he did not report Sanchez to the police because he was afraid of him. Eight months before the night that Sanchez and Octavio came to his trailer, Contreras said Sanchez "tried to murder me." Sanchez had been playing cards with a group and had lost all his money. When the other players went inside, Sanchez pulled out a knife and told Contreras, " 'You're going to give me all the money that you have, you mother fucker, or you're going to be fucked.' "

In 1985, Contreras married Sanchez' and Octavio's sister, Lidya. In 2008, Sanchez and Lidya were involved in litigation against each other. During the course of their dispute, Sanchez called Lidya a "witch," and showed up at the Contreras' house to

[5] At the outset of his testimony, Contreras said he had suffered a stroke sometime in the past year.

threaten them, saying, "I'm going to kill you, you mother fuckers." After Sanchez physically "beat" Lidya, Contreras told the police about what happened that night in 1982 when Octavio and Sanchez came to his trailer.

7. Lidya's testimony

Lidya testified she loaned Sanchez $7,000 in 2007, and he became upset with her when she later asked him to repay it. Their dispute over the loan ended up in court in 2008. In the hallway of the courthouse, Sanchez accused Lidya of being a "witch," and she called him an "assassin" or "murderer." When Sanchez asked why she said that, Lidya replied that Octavio had told her. In a mocking tone of voice, Sanchez said he "hadn't done it, so what was it to [her]?"

8. Cynthia Lorenzi's testimony[6]

Cynthia Lorenzi testified that she married Sanchez' brother, Octavio, in the late 1970s, but they divorced approximately five years later. In 1982, she and Octavio lived at Shandon Star Nursery in Paso Robles. In May 1982, she knew that Sanchez worked at a ranch in San Miguel. Around that same time, she learned that a murder occurred at that ranch.

On the Sunday before the murder, Lorenzi went to a baptism at the San Miguel mission. Octavio and Sanchez were also there, though she was not sure if Sanchez went to the baptism or was simply at the park afterwards, drinking beer. At about 5:00 p.m., Sanchez and several others left the park and went to Lorenzi's house where they all continued to drink and talk. Sanchez was drunk, but he was able to stand and carry on a conversation.

Sanchez and Octavio left the house after dark, along with just about everyone else. Around midnight or 1:00 a.m., Lorenzi was in bed when she heard a car in the driveway.

[6] At the beginning of her testimony, Lorenzi said her memory had been affected by three strokes she had suffered in the past five years.

Octavio entered the bedroom and told her to go to the kitchen with him. When she entered the kitchen, Sanchez was sitting at the table. Octavio said they had to get Sanchez "out because . . . he had shot somebody." Octavio said, " 'This son of a bitch just got through killing the boy out at the ranch.' " Lorenzi did not recall Sanchez responding to what Octavio said.

Octavio and Sanchez remained at the kitchen table for a couple of hours. Lorenzi acted as if she were going back to the bed, but instead stood behind the wall listening to them talk. She overheard Octavio ask Sanchez, " 'Why did you shoot? Now we got to get you out of here. You were dumb. You got to go.' " Sanchez did not respond. She also heard Octavio tell Sanchez, " 'You almost killed me, because you shot him, and I was right there hugging him.' "

Lorenzi returned to her bedroom. Sometime after the sun rose, Lorenzi heard the door close and she saw Octavio and Sanchez outside. They walked to Octavio's car, a gray or silver Ford Granada, and Sanchez took a shotgun out of the trunk. Octavio and Sanchez got shovels and buried the shotgun along the fence line of a nearby field.

Lorenzi went to work sometime after 7:00 a.m. that morning. When she returned home that afternoon, Octavio was holding a pistol and threatened to shoot her unless she drove Sanchez to Tijuana. Lorenzi drove Octavio and Sanchez, along with her two-year-old daughter to Tijuana. She recalled the drive took about eight hours and when they reached Tijuana, they dropped Sanchez off so he could take a bus to his parents' home. She, Octavio and her daughter drove straight back to Paso Robles.

Lorenzi recalled that Octavio took her out to the ranch at some point in time and showed her a tree, saying " 'That's the tree, right there, where the body was laying against.' " She was not certain whether Sanchez was with them when this occurred.

9. Police interviews with Lorenzi

Detective Price interviewed Lorenzi at her residence on May 18, 1982 and, by stipulation, portions of Price's report documenting that interview were read to the jury.

Lorenzi told Price there had been 12 or 13 people at her house dancing and celebrating the baptism. She went to sleep around 11:00 p.m. or possibly as late as midnight, and no one said anything about a shooting at any point in the evening. When she went to bed, Octavio, Sanchez and several other people, including "Rogelio," were still in the living room.

When she got up the next morning at 7:00 a.m., the three men were asleep in the living room. She left for work around 90 minutes later. When she returned home at about 9:30 or 10:00 a.m., no one was there and their car was gone. Octavio, Sanchez, and her children returned in the car a short time later along with two other men.

Price interviewed Lorenzi again on May 19, 1982. In this interview, she said she did not really remember whether Octavio and Sanchez left the house any time after the baptism and before she went to bed, but she was relatively sure they had not. She again said she did not "hear anyone mentioning shooting Sandoval."

Detective Shaheen Jorgensen interviewed Lorenzi on May 23, 2008. In this interview, Lorenzi said she observed Octavio and Sanchez bury a shotgun near her house in 1982. Afterwards, Octavio told her she was going to drive Sanchez to Tijuana, threatening her with a double-barreled shotgun. Lorenzi said she asked Octavio why he was threatening her, and he told her, " 'One's for you and one's for me.' " When she responded, " 'Who's going to give you yours?' " she saw him start to pull the trigger. Lorenzi threw up her arm, redirecting the shotgun, and the blast tore a hole in the roof of their car.

Lorenzi also told Jorgensen that Octavio showed her the tree where he and Sanchez had left the body. She first said this took place a couple of days after they took Sanchez to Tijuana. She subsequently clarified that the murder took place on a Sunday, and therefore Octavio must have driven her out to the ranch on Monday afternoon or evening. It was after that trip to the ranch that he threatened her with the shotgun and told her to drive Sanchez to Tijuana. That was also when she saw a .380-caliber handgun

in the glove box. Lorenzi said she subsequently drove both Octavio and Sanchez to Tijuana but was able to return to Paso Robles in time for work the next day.

After Jorgensen asked Lorenzi to visualize a calendar in her head to orient herself on the day after the killing, Lorenzi told Jorgensen she recalled Octavio and Sanchez were actually *not* home when she got up at 7:00 a.m. on that particular Monday to go to work. When she came home to fix lunch, they were still not home. Octavio returned around 2:00 p.m., but she did not remember Sanchez being with him. She fed Octavio, then she returned to work until between 5:00 and 6:00 p.m.

When she got home that evening, Octavio and Sanchez were sitting at the kitchen table discussing the murder. Octavio told her to leave, but she went around the corner and stood behind the wall to the kitchen, eavesdropping. Lorenzi said she overheard Octavio telling Sanchez he would have Lorenzi drive them to Tijuana, and he would kill her if she refused. Octavio and Sanchez also talked about what to do with the gun and Octavio said they should bury it immediately. Lorenzi watched them from the window as they retrieved a shotgun from the car and took a shovel from the shed. Sanchez carried the gun to the tree line where they buried it.

Octavio and Sanchez returned to the house. Octavio asked Lorenzi if she would like to go for a ride, and she agreed. They drove out to the ranch where Sandoval had been killed and that is when Octavio showed her the tree where Sandoval's body was. Lorenzi asked Octavio how Sanchez did it, but he did not answer. Instead, he told her she was going to drive Sanchez to Tijuana. When she refused, Octavio pulled out the .380-caliber handgun and told her they were going. They returned to the house to pick up Sanchez, and left in the dark so no one would see them. They drove straight through to Tijuana and back. Lorenzi said she and Octavio got back home between 6:30 and 7:00 a.m. in time for her to go to work. She also said they might have arrived shortly before detectives came to her house that morning at 10:25 a.m.

Lorenzi told Jorgensen she did not remember talking to the detectives that morning but recalled only that they were looking for Octavio, who had just taken their daughter out to a restaurant. The detectives returned a day or two later and arrested Octavio. He was soon released, and Lorenzi said Octavio beat her badly when he got out of custody, because he thought she was the person who called the police.

Jorgensen testified she interviewed Lorenzi again in November 2011. In that interview, Lorenzi told her that she did not remember talking to Jorgensen in 2008.

10. Lawrence Mora's testimony

Lawrence Mora owned the ranch next to Rancho Lejos. Sanchez had worked for Mora for about seven months in 1982.

Early one morning, Sanchez showed up at Mora's house in a car with several other men, asking for his last paycheck. After Mora gave him his check, Sanchez climbed back into the car. Mora smelled alcohol and thought some of the men in the car were asleep or passed out. Sanchez "walked on his own okay. Maybe a little topsey-turvy."

At about 7:30 a.m. that same day, Mora saw Sanchez asleep in the front seat of the car, parked at another nearby ranch. Mora walked to the car and woke Sanchez up. Sanchez said he had lost his paycheck, so Mora helped him look for the check in the car. Mora opened the glove box and saw the butt of a pistol. Later that same day, Mora learned that Sandoval had been killed.

By stipulation, portions of a report prepared by Detective Price regarding his interview with Mora were read into the record. In that interview, Mora told Price that Sanchez arrived at his house on May 17, 1982, at about 6:00 a.m. in a gray Ford Granada. He was accompanied by Octavio and another man, Rogelio Legoretta. Mora said that both Sanchez and Octavio were "extremely drunk."

11. Isabel Madrid's testimony

In May 1982, Isabel Madrid lived with Legoretta on the ranch where they both worked. Madrid had known Octavio for about a year, but he had never met Sanchez. Madrid heard about Sandoval's murder the day after it happened.

Madrid overheard Octavio talking with Legoretta about midnight the night before the murder. Madrid first testified Octavio was alone at the time, but subsequently said there was another person there, who he assumed was Sanchez. Madrid could only hear their voices, since he was in bed, about 10 feet away, "covered."

Octavio and whoever else was with him stayed about 15 minutes. Legoretta left with them. On cross-examination, Madrid said he could not recall hearing Octavio tell Legoretta, "We're having a party at my house. Let's go get some beer," but admitted that if that statement was in the police officer's report, he probably said it at the time.

12. Forensic evidence

a. John Jardine's testimony

In 1982, John Jardine was employed as a coroner's investigator with the Monterey County Sheriff's Department. When he arrived at Rancho Lejos around 11:00 a.m. on May 17, 1982, Detective Price escorted him behind a building to where Sandoval's body lay.

Jardine observed blood in the doorway of Sandoval's residence along with some drops of blood on the steps and the door. A blood trail led from the door to where Sandoval's body was found.

Sandoval was six feet two inches tall. He had a gunshot wound to the upper right chest, but Jardine did not recall there being any black soot or powder burns on Sandoval's t-shirt. Inside the dwelling, police found a sawed-off 20-gauge shotgun. Jardine testified that if Sandoval's wound was caused by that particular shotgun, the shooter was anywhere from six to 10 feet away. Because investigators found no shotgun pellets in or

around the entryway, Jardine opined Sandoval's body had probably taken the full impact of the blast.

Jardine estimated Sandoval most likely died about 12 hours prior, placing the time of death somewhere between 11:00 p.m. to midnight. Sandoval's body displayed full rigor mortis. As he turned the body over, Jardine looked to see if there were any changes to where the blood had settled inside Sandoval's body after his death or if it was coagulated and set. Based on his observations, Sandoval's blood was coagulated meaning he had died sometime between 10 and 12 hours beforehand. The blood trail from Sandoval's doorway to where his body was found was "extensive." The blood was dry, but not yet "crumbly."

b. Dr. John Hain's testimony

Dr. John Hain, a forensic pathologist, testified after reviewing the May 17, 1982 pathologist's report by Dr. E.E. Simard[7] and the accompanying autopsy photographs. In Dr. Hain's opinion, the shotgun which killed Sandoval was likely fired from a distance of a little less than six feet, due to the nearly circular nature of the wound, which indicated the pellets did not have time to spread before impact. In addition, the plastic wadding from the shell was lodged in the back of Sandoval's chest cavity.

According to Dr. Hain, the cause of death was the shotgun wound which lacerated Sandoval's lung, liver and heart, causing massive internal hemorrhaging. Despite the damage to his internal organs, Sandoval could have remained conscious for anywhere from 10 seconds to one minute after being shot. From the blood trail, Dr. Hain could not determine whether Sandoval walked to where his body was found or if he had been dragged there.

[7] The parties do not explain why Dr. Simard did not testify, but his failure to testify is not raised as an issue on appeal.

Dr. Hain placed the time of Sandoval's death at about 12 hours before the body was found, or sometime between 11:00 p.m. and midnight. The body was "in full rigor mortis with posterior lividity that was fixed." Dr. Hain acknowledged both rigor mortis and lividity can be slowed by cooling, but in this case the outside temperature when the body was found was 70 degrees. Because rigor and fixed lividity can last anywhere from 24 to 30 hours, Dr. Hain conceded the time of death could be earlier. However, Dr. Hain found there was no evidence in the reports, such as insect or other scavenger activity on the body, to suggest Sandoval was killed earlier.

The trajectory of the wound was front to back and downwards. Although Sandoval was six feet two inches tall, Dr. Hain did not have enough information to offer an opinion on the location of the shotgun at the time it was fired. He testified that the impact of the shot would not necessarily send a person reeling or cause them to spin in the direction of the shot. It would depend on the initial position of the person's body and where the weight was on the person's feet at the time of impact. The angle of the wound trajectory would not be helpful in determining the position of the gun as it was fired unless one also knew how the victim's body was positioned at the time. According to Dr. Hain, a victim will sometimes lean forward or crouch in an attempt to avoid being shot. Without knowing how the victim and the shooter were positioned at the time of the killing, Dr. Hain could offer no opinion on the shooter's height.

c. Evidence collected/photographed at the scene

On May 17, 1982, Marvalee English, an identification technician from the Monterey County Sheriff's office photographed and collected evidence at the crime scene. English found an expended 20-gauge shotgun shell in the front yard near the west end of the driveway. There were numerous beer bottles, some unopened and others either empty or half-empty, in the garage and the house. English collected an envelope addressed to Sanchez that was lying on a mattress in the bedroom. One of the unopened beer bottles collected at the residence had a fingerprint that was matched to Octavio.

13. Sanchez's interviews with police

Detective Jorgensen, with the assistance of Spanish-speaking Detective Alfred Martinez, interviewed Sanchez on September 7, 2011. Over defense objection, a recording of the interview was played for the jury.

Sanchez told the detectives he came to the United States from Mexico in 1975 when he was 12 years old. At the time of the interview, he said he was 53 years old.[8]

Sanchez remembered working at a horse ranch for about three months in 1982. He returned to Mexico that same year because his father was sick. Sanchez told his brother Octavio he was leaving, and his brother told Sanchez's boss. He took a bus from Paso Robles to Mexico. Sanchez remained in Mexico for about five months, but when he returned another of his brothers was working at the horse ranch, so Sanchez continued north to Santa Rosa to find work.

After further questioning by the detectives, Sanchez discussed the period of time leading up to Sandoval's death. He said on "that day we were drunk. . . . The honest truth we ended wrong. . . . We fought like 5 times." He said "out of rage well I did that, yes, it happened." Martinez asked Sanchez where he got the shotgun, but Sanchez could not remember, saying "I don't remember who it came from. I don't . . . know where—I just it seems we were both drinking, yes, and I don't remember if it was in his car, in my car . . . . All that I know is that I lost my marble. [*Sic*.]"

Sanchez did not know he had killed Sandoval until other people told him he had and he did not "imagine that serious. [*Sic*.]" Sanchez admitted he went to Mexico because "I was afraid of the law." Asked how he felt, Sanchez said it was "a great

[8] If Sanchez was 12 years old when he arrived in the United States in 1975, he would have been 48 years old in 2011. The age discrepancy, intentional or not, is not relevant to this appeal, but we would be remiss if we neglected to point it out.

mistake" but he could not bring Sandoval back. Sanchez did not know what happened to the shotgun afterwards.

Detective Martinez later asked Sanchez directly: "[Y]ou do k[n]ow that . . . you shot [Sandoval] with a shotgun?" and Sanchez replied "Yes." However, Sanchez again said he only thought he had injured Sandoval, and it was not until the next day, when Octavio "scolded" him about the killing, that he learned Sandoval had died.

Sanchez did not leave for Mexico until about three days later, and then he stayed in Mexico for about 10 to 15 years. During that time, he got married and had children. Detective Jorgensen told Sanchez she knew he did not take a bus to Mexico, but Sanchez said he did not remember.

Later in the interview, Sanchez provided additional details of the events leading up to the shooting. He stated that he was with a man from Jalisco[9] and with Sandoval drinking at a bar in Avenal. When Jalisco was driving them back, Sanchez and Sandoval got in several fights over a woman, and Sandoval made Sanchez bleed. When they returned to Sandoval's residence, they continued drinking. They drank a lot that day—beer, whiskey, tequila, and champagne. At some point Octavio showed up, but Sanchez could not remember how or when Octavio got there.

Sanchez participated in a second interview with police on October 19, 2011. In this interview, Jorgensen was assisted by Spanish-speaking Detective Alex Aguayo. Sanchez told the detectives he was drunk during his first interview in September and did not recall what he had told them. He insisted the real reason he went to Mexico after the murder was because his parents were sick. Sanchez denied being involved in the shooting and denied previously admitting to Sandoval's murder.

[9] Sanchez testified at trial he did not know this man's true name, but everyone called him "Jalisco," apparently because of his origin.

Sanchez said he could not take the blame for something he did not remember doing, and on several occasions, said he could not give the detectives an account of what had happened because he did not recall. He told Aguayo and Jorgensen: " 'His brother Octavio had told him he had to leave, and for him[10] to take responsibility for the death.' " Sanchez said he had fought with Sandoval a few times that night, and Sandoval broke his nose at some point.

14. Search for the murder weapon

On May 28, 2008, Detective Jorgensen and other law enforcement officers went with Lorenzi to try to find the shotgun she saw Octavio and Sanchez bury in 1982. Sometime between 1982 and 2008, the property had been converted to a vineyard. Lorenzi directed the searchers to the area where she believed the shotgun had been buried. Using metal detectors, the officers found multiple bottle caps and pieces of wire, but not a shotgun, despite an expansive search.

B. Defense case

Sanchez testified in his own behalf. He said he could remember parts, but not all, of the events around the time of Sandoval's[11] death in 1982.

In 1982, Sanchez worked for Mora for about five or six months, then left that job to work at Rancho Lejos. He worked at Rancho Lejos for one or two weeks.

In May 1982, Jalisco picked up Sanchez and Sandoval at Rancho Lejos and drove to a bar in Avenal. They left the ranch sometime after 2:00 p.m., and it took about an hour and a half to get there. Along the way they stopped at a bar in "Park Field"[12] and bought an 18 pack of beer, drinking about 12 of those along the way to Avenal. They arrived at the bar in Avenal sometime around 4:00 p.m. or after, but the bar was mostly

[10] Presumably Sanchez.

[11] Sanchez said he knew Sandoval by the name "Manuel Pesqueira."

[12] We presume Sanchez was referring to the town of Parkfield in Monterey County and this was mistranscribed.

empty. The three men left and bought a 30 pack of beer at a store in town. They drank the remainder of the 18 pack, and Sanchez drank about five more beers from the 30 pack in the store's parking lot.

When they returned to the bar, it was crowded, and Sanchez invited a girl to have some drinks with him. She accepted, and they sat down at a table. Sanchez switched to hard liquor and had maybe five or six more drinks with the girl.

Sandoval came up to their table and asked the girl to dance with him, but she refused. Sanchez told Sandoval the girl was with him and they began arguing. They stepped out of the bar to fight and traded a few blows before they were separated. They went back inside, and Sanchez began drinking again. At some point, when "[i]t was quite late," Jalisco came up and said it was time to go.

On the drive back, Sandoval was in the front passenger seat and Sanchez was behind him. They continued to argue about what happened in the bar. Jalisco saw that they were going to fight so he pulled over and they got out. The two men, both of whom were drunk, started fighting until Jalisco broke them up. They all got back in the car and resumed driving back to the ranch. Sanchez and Sandoval continued to argue in the car, and fought three or four more times before reaching their destination. In the last fight, Sandoval broke Sanchez's nose. Sanchez said he was upset by this, but not very angry.

Sometime later, Jalisco dropped Sanchez off at a friend's house in San Miguel. Sanchez washed his face and changed into a clean shirt his friend gave him, then went to sleep. He woke up the next day sometime after 11:00 a.m., and went to the baptism party in San Miguel.

Octavio and his wife were also at the party. Sanchez began drinking beer again, but did not know how much he drank. After leaving the park, Sanchez went to Octavio's house where the party continued. He drank more beer, though he did not keep track of how much, and suddenly "just fell asleep."

Sanchez did not leave the house that night. The next morning, around 6:00 a.m., Octavio drove Sanchez to the ranch where he used to work to get his paycheck from Mora. Sanchez said he was still drunk at the time. After he picked up his check, he and Octavio, along with some of Octavio's friends who were in the car, went to Rancho Lejos.

When they got to Rancho Lejos, they stopped in front of Sandoval's house. Sanchez said he wanted to tell Sandoval to tell his boss he was not going to work that day because he was drunk. Sanchez and Octavio got out of the car. Cristovol walked up to them and asked Octavio where Sandoval was. Because he did not see Sandoval, Sanchez told Cristovol to relay the message to his boss. Sanchez said he got back in Octavio's car and they drove to San Miguel. At no time did Sanchez or Octavio enter anyone's residence at Rancho Lejos, nor did Sanchez see anyone walk around behind the houses.

They bought more beer in San Miguel, and then returned to Octavio's house. Lorenzi was not there when they arrived. They continued drinking. Sanchez did not return to work the next day because he was still drunk. By the second or third day he felt sober enough to go back to work, but could not recall if he did so.

At some point, Octavio told Sanchez that he had to go to Mexico, but did not tell him why. Because Octavio was so insistent, Sanchez was "convinced" he had to do as his brother said. Lorenzi was not present during their discussion about going to Mexico.

Sanchez did not own any guns,[13] but he knew that Octavio had a .380-caliber handgun as well as a breech-loader rifle. Sanchez did not know whether Octavio also owned a shotgun. He denied burying a shotgun with Octavio on or around Octavio's house.

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[13] Exhibit No. 42 was a letter from Sanchez's father to Sanchez, in which Sanchez's father referred to Sanchez having a .380-caliber handgun and cautioned him not to handle the weapon when he was drunk. When asked about this letter, Sanchez said his father mistakenly believed this gun belonged to him, but it was actually Octavio's.

Either Octavio or Filipe Morales took Sanchez to the bus station in Paso Robles, where he bought a ticket to Tijuana. After arriving in Tijuana, Sanchez purchased another bus ticket to San Juan Nuevo where his father lived.

About five or six months later Octavio, Lorenzi, and their children visited San Juan Nuevo. Octavio asked their father for forgiveness for sending Sanchez to Mexico and for falsely "saying that [Sanchez] had killed [Sandoval]." Octavio said Sanchez did not "owe anything" and he, Octavio, was responsible for "what had happened." Sanchez returned to the United States once Octavio paid a "coyote" to smuggle him across the border. He lived with Octavio and Lorenzi for about three days, then started working in Atascadero.

When Sanchez was asked about his September interview with the police, he said he admitted shooting Sandoval because the detectives "didn't tell me what they really wanted to know. . . . And I'd get all confused." He was "very tired mentally" so "I just told them 'yes.' " He acknowledged, however, the atmosphere at his initial interview was "relaxed" and he told the detective that he felt fine during the interview. Sanchez clarified it had been "so many years," his "mind wasn't functioning properly[, although] [p]erhaps I didn't tell her that." Part of his confusion stemmed from Jorgensen's questions, which were not focused on one thing at a time.

By the time of the second interrogation a month later, Sanchez testified his mind had "opened up a bit" and he had been "able to focus more." After his first interview, his attorney showed him "evidence of this, evidence of that, that has helped me have a clear mind and remember things clearer."

Sanchez acknowledged he told Jorgensen in his interview that he was in Mexico for 10 to 15 years, but at trial testified he was only there for eight to 10 months. He explained he "wasn't thinking normally" when he spoke with Jorgensen.

Sanchez also admitted that he never told police, in either interview, that he and Sandoval were arguing about a girl at a bar or that he first began fighting with Sandoval

at the bar. Sanchez said he did not know of any problems Octavio had with Sandoval that might have led Octavio to murder him.

C. Jury verdict and sentencing

The jury found Sanchez guilty of first degree murder (§ 187, subd. (a)) and also found that Sanchez personally used a shotgun, in the commission of that crime. (§ 12022.5, subd. (a).)

After denying Sanchez's motion to set aside the verdict and motion for a new trial, the court sentenced Sanchez to a total term of 27 years to life consisting of 25 years to life for the murder, plus a consecutive two year term for the firearm enhancement. The trial court imposed a restitution fine of $4,000 under section 1202.4, subdivision (b), and victim restitution in an amount to be determined by the probation department under section 1202.4, subdivision (f). The court imposed an additional restitution fine of $4,000 under section 1202.45 but ordered that fine suspended pending successful completion of parole, if any.

Sanchez timely appealed.

II. DISCUSSION

A. Adoptive admissions

1. Relevant procedural background

Before trial, the prosecutor filed a motion in limine to admit various hearsay statements at trial, including Octavio's statements reported by Lorenzi as well as the statements Octavio made in the presence of Contreras. The prosecutor argued these statements, though hearsay, were admissible as adoptive admissions under Evidence Code section 1221.

The defense objected. As to Lorenzi's testimony, defense counsel argued the statements were inadmissible because they lacked foundation, Lorenzi was biased, and Octavio was not present in court to be cross-examined. The trial court ruled that, so long

as the prosecution laid a sufficient foundation for the statements, the testimony would come in as adoptive admissions.

Turning to the statements Octavio made in the trailer, defense counsel argued there could be no adoptive admission of them by Sanchez since Campoverde would testify that Sanchez never entered the trailer and thus was not present when Octavio spoke. The prosecution countered that Contreras would testify Sanchez did, in fact, come into the trailer and was present when Octavio was talking. The trial court deferred ruling until further information was developed. At trial, Campoverde and Contreras testified essentially as counsel indicated they would.

The trial court instructed the jury on this issue (CALCRIM No. 357) as follows: "If you conclude that someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

2. Standard of review and applicable legal principles

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless it qualifies under one of the

exceptions to the hearsay rule, such as the adoptive admissions exception set forth in Evidence Code section 1221. "A statement by someone other than the defendant is admissible as an adoptive admission if the defendant 'with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in its truth.' (Evid. Code, § 1221; see *People v. Preston* (1973) 9 Cal.3d 308, 314 & fn. 3.)" (*People v. Davis* (2005) 36 Cal.4th 510, 535 (*Davis*).) A trial court determining whether a statement is admissible as an adoptive admission must first decide whether there is sufficient evidence that: "(a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*Ibid*.)

" '[I]f a person is accused of having committed a crime, *under circumstances which fairly afford him an opportunity to hear, understand, and to reply,* and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' " (*People v. Jennings* (2010) 50 Cal.4th 616, 661, italics added.)

" ' "[O]nce the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule." ' " (*People v. Cruz* (2008) 44 Cal.4th 636, 672.) " 'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; *whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide*.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1189-1190, italics added.)

3. Analysis

Sanchez argues that, given the evidence of his extreme intoxication and the ambiguity of the circumstances surrounding the statements purportedly made by Octavio, his silence lacked sufficient probative value to show consciousness of guilt, and those statements should have been excluded. We agree.

In support of his argument, Sanchez cites *People v. Simmons* (1946) 28 Cal.2d 699 (*Simmons*) and *People v. Bracamonte* (1961) 197 Cal.App.2d 385 (*Bracamonte*) both of which stand for the proposition that, under certain circumstances, an accused's silence in the face of an accusatory statement should not be considered an adoptive admission of that accusation. The *Simmons* court listed a number of such situations, e.g., where the accused is under arrest, in fear for his or her safety or the safety of others, in severe physical or emotional pain. (*Simmons*, *supra*, at pp. 715-716.) *Bracamonte* suggested that being under the influence of drugs or alcohol may also explain an accused's failure to refute an accusatory statement. (*Bracamonte*, *supra*, at p. 390.) In this case, no foundation was laid by the prosecution to meet the test of these cases.

In this case, there was no dispute that Sanchez was intoxicated both *before* and *after* he murdered Sandoval. Every witness who came into contact with him during that time period testified Sanchez was drunk. Consequently, the issue was not whether he *was* drunk; rather, it was whether he was *too* drunk to be able to hear and understand Octavio's statements incriminating him in the murder and, if not, whether by his silence or inaction he adopted the statements as true. (*Davis*, *supra*, 36 Cal.4th at p. 535.)

However, even though the trial court erred in admitting the statements at issue, Sanchez cannot show prejudice as a result. It is not "reasonably probable that a result more favorable to defendant[s] would have [resulted]" had the testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Had these particular statements not been admitted, the jury still heard Sanchez's admission to police that he shot Sandoval. Multiple witnesses confirmed that Sanchez was with Sandoval the day before he was killed, that he and Sandoval fought several times that day with Sanchez getting the worst of those encounters, that Sanchez left Lorenzi's house late that night, that Sanchez was at the ranch trying to collect his paycheck early the next morning, and that Sanchez soon afterward went to Mexico. Octavio's statements were undeniably strong evidence of Sanchez's guilt, but it is simply not reasonably probable the jury would have acquitted Sanchez without them.

B. Testimony about prior threats by Sanchez

Sanchez next argues the trial court erred by permitting testimony about an incident in which Sanchez threatened Contreras with a knife and demanded money from him. Testimony about this same incident was elicited during the prosecutor's redirect examination of Contreras as well as during his cross-examination of Sanchez. Finally, Sanchez argues the trial court erred by permitting Contreras to testify that Sanchez had come to his home during the time Sanchez and Lidya were involved in a civil lawsuit and threatened to kill him and Lidya.

1. Relevant factual background

a. Contreras' testimony about being robbed at knifepoint

In cross-examination, defense counsel asked Contreras about the reasons he did not contact police after learning Sanchez had killed someone. Before redirect, the prosecutor asked for a sidebar conference and sought permission to introduce testimony that Contreras did not contact police because he was afraid of Sanchez. The trial court allowed the prosecutor to ask Contreras again why he did not contact police, but without suggesting or leading Contreras into citing fear as a motivation since he did not offer this as a reason during cross-examination.

On redirect, Contreras at first said he could not recall the reasons he gave on cross-examination for not calling the police. The prosecutor reminded Contreras of the

various reasons he had given before asking if there "was . . . another reason you didn't contact police?" Contreras replied, "Because he's quite a traitor. And I said I don't want the same thing to happen to me as to the person that he murdered." When asked to elaborate, Contreras explained that, "[a]bout eight months before he committed the murder," Sanchez pulled a knife on him after losing all his money playing cards. Sanchez threatened to kill Contreras if he did not give him his money. The trial court immediately instructed the jury that Contreras' testimony was admitted for the limited purpose of explaining why Contreras did not contact police, not for the truth of the matter asserted.

b. Sanchez's cross-examination about the robbery

Subsequently, when Sanchez took the stand, the prosecutor asked him on cross-examination if he recalled Contreras testifying about the knife incident. When Sanchez said he did, the prosecutor asked Sanchez if it would be a crime to "hold[] a knife to somebody and threaten[] them with it[?]" Sanchez responded, "If I had done it, yes. But if I hadn't—"

Outside the presence of the jury, the trial court memorialized a side-bar discussion that took place prior to this line of questioning. During that conference, the prosecutor argued Sanchez had opened the door by stating in his direct examination that he had "no criminal history against anybody." Defense counsel responded that Sanchez's statement was referring to his being able to return to the United States with a clean conscience about Sandoval's death. It was not, according to defense counsel, a more blanket statement that Sanchez had never committed a crime against another person. The trial court ruled that, although defense counsel's question to Sanchez was narrowly tailored, Sanchez gave a broad answer and defense counsel did not move to strike that answer. Under Evidence Code section 352, the trial court ruled it would be unfair for Sanchez to "paint himself in a false light" and overruled defense counsel's objection.

c. Contreras' testimony about Sanchez's threats

Lidya testified when she and Sanchez were in court in 2008 on an unrelated civil matter relating to an unpaid loan, Sanchez called Lidya a "witch." Lidya further said she had gone to police more than once to complain about Sanchez.

During Contreras' cross-examination, defense counsel asked if he was aware that Lidya was upset by her brother, Sanchez, calling her a "witch." Contreras did not respond to that question, but said, "And many times he came to our house threatening us and yelling and saying 'I'm going to kill you, you mother fuckers.' "

Defense counsel objected to the answer as nonresponsive, but following a bench conference, the trial court overruled the objection. At the bench, the trial court noted defense counsel had objected to Contreras' answer as "either nonresponsive or otherwise objectionable." The trial court observed that defense counsel, who also spoke Spanish, was objecting before the answer could be translated by the interpreter. As a result, the court could not gauge whether the objection was well-taken if it did not hear the translation. Defense counsel said that if his question called for a "yes" or "no" response, sometimes the answer would go beyond that. To prevent the jury hearing inadmissible evidence, defense counsel would object before the response was translated. The trial court replied that Contreras' answers were appropriate as they were responsive and explained the "yes" or "no" answers, even if defense counsel was unhappy with those explanations.

2. Standard of review and legal principles

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

It is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986)

182 Cal.App.3d 361, 402.) Accordingly, the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid*.)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.) " 'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

3. Analysis

a. Sanchez forfeited his objection to Contreras' testimony about Sanchez threatening him and Lidya

Sanchez forfeited his claims that the trial court's rulings on this evidence violated Evidence Code section 352, as well as his right to due process, by failing to obtain a ruling on his objections at trial and further by failing to move that Contreras's answer to his question be stricken.[14] " 'In the absence of an erroneous ruling on an objection or request that a nonresponsive answer be stricken and the jury instructed to disregard it,

[14] We address below Sanchez's claim that his trial counsel was ineffective for failing to object to Contreras's testimony under Evidence Code section 352.

there is no error.' " (*People v. Jackson* (1996) 13 Cal.4th 1164, 1214.) An objection that the answer was nonresponsive is insufficient to preserve a claim of error for appeal. " 'A nonresponsive answer is properly the subject of a motion to strike (Evid. Code, § 766), not an objection.' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249.)

b. The evidence of Sanchez robbing Contreras at knifepoint was more probative than prejudicial

In this case, the trial court properly found that Contreras's testimony about Sanchez threatening him with a knife was relevant since Contreras, without being prompted by the prosecutor, testified that his fear of Sanchez was a reason for not contacting police. The evidence, while somewhat prejudicial to Sanchez, was more probative in that it provided the jury with an additional reason for Contreras not contacting police, as opposed to his other explanations of not knowing how to drive a car or operate a telephone.

Furthermore, the potential prejudice of this testimony was diminished by the trial court instructing the jury, immediately after the testimony came out, that it was not to consider it as evidence that Sanchez did in fact threaten Contreras with a knife but only to explain why he did not contact police. In general, such a limiting instruction eliminates "any danger 'of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) We presume the jury followed the instructions it was given. (*People v. Cain* (1995) 10 Cal.4th 1, 34.)

Likewise, Sanchez's testimony on cross-examination about this incident was elicited to counter his self-serving declaration on direct that he had "no criminal history against anybody." The jury had previously heard Contreras's testimony about this incident, so there was little additional prejudice to Sanchez's defense in asking a single question about whether he considered threatening someone with a knife to be a "crime against a person."

c. Any error was harmless

Even assuming the trial court abused its discretion in admitting Contreras's testimony or allowing Sanchez to be asked about the incident on cross-examination, those errors were harmless. Generally, the admission of evidence in violation of state law is reversible only upon a showing that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) A due process clause violation, requiring review under the more stringent federal standard set forth in *Chapman v. California* (1967) 386 U.S. 18, occurs where the admission of the evidence "makes the trial *fundamentally unfair*." (*People v. Partida*, *supra*, 37 Cal.4th at p. 439.) The admission of the testimony at issue here was not " 'so prejudicial as to render the defendant's trial fundamentally unfair.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Accordingly, we apply the *Watson* harmless error standard.

As discussed above, there was ample evidence that Sanchez murdered Sandoval, not the least of which was Sanchez's confession to the crime in his September 2011 interview with police. In addition, Lorenzi and Contreras testified that Octavio made statements—in Sanchez's presence—implicating him in the killing, and Sanchez did not refute those statements. Several witnesses, and Sanchez himself, testified that Sanchez had physically fought several times with Sandoval the day of the murder. The evidence of the knife incident was admitted to bolster Contreras's credibility in his testimony that Octavio said that Sanchez had killed Sandoval, notwithstanding the fact that Contreras did not tell anyone about it at the time.

Sanchez argues, as he did below, that it was possible Octavio was the one who killed Sandoval and he implicated Sanchez in order to deflect suspicion. This explanation is highly implausible. There was no evidence presented at trial that Octavio knew Sandoval, much less had any reason to harm him. It is not reasonably likely that

the jury would have acquitted Sanchez even if it had not heard any testimony about Sanchez threatening Contreras with a knife.

C. No ineffective assistance of counsel

Sanchez also argues that his trial counsel was ineffective for failing to raise an appropriate objection to Contreras's testimony about him threatening to kill Contreras and Lidya.

A cognizable claim of ineffective assistance of counsel requires a showing "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Id*. at p. 688.) To prevail on an ineffective assistance of counsel claim, a defendant must also establish counsel's performance prejudiced his defense. (*Id*. at p. 687.) To establish prejudice, a defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

Sanchez has not met his burden here to prove either prong of the *Strickland* test, i.e., he has not shown his trial counsel's performance was deficient, nor has he shown a reasonable probability the result of the trial would have been different had the objection been raised.

During cross-examination, defense counsel was seeking to undermine Contreras's credibility by showing he was biased against Sanchez because of the acrimonious relationship Sanchez had with Lidya (Contreras's wife). Contreras's response to defense counsel's questioning was unexpected, to say the least, and certainly tangential. However, a trial attorney, in deciding whether to object, must engage in a rapid mental cost-benefit analysis, and this analysis is among " 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the

heat of battle.' " (*People v. Riel, supra,* 22 Cal.4th at p. 1202.) Having elicited this surprising response from Contreras, trial counsel could reasonably have concluded—as a tactical matter—that it was better not to move to strike the answer and thereby risk highlighting for the jury what they might otherwise have discounted.

D. Sanchez's statements to police were not involuntary

Renewing an argument raised in the trial court, Sanchez claims his confession was involuntary because it was given in response to an offer of leniency. On appeal, Sanchez highlights three statements made by detectives during his interview which he contends amounted to improper promises of leniency. First, "he was told that 'consequences' would not be 'as severe if, if we admit to what we have done.' " Second, he "was told that things 'are always worse' if one did not accept responsibility 'beforehand.' " Third, he "was told that 'the hole' would get 'deeper' if he did not admit responsibility."

1. Relevant legal standards

"A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity." (*People v. Williams* (1997) 16 Cal.4th 635, 659 (*Williams*).) In other words, "involuntariness requires coercive activity on the part of the state or its agents[] and [that] such activity [was] the 'proximate cause' of the statement in question, and not merely a cause in fact." (*People v. Mickey* (1991) 54 Cal.3d 612, 647.) In deciding the question of voluntariness, we apply a " 'totality of [the] circumstances' " test. (*Williams, supra,* at p. 660.) Among the relevant circumstances are "the characteristics of the accused" (e.g., age and education) and "the details of the interrogation" (e.g., "the length of detention," "the repeated and prolonged nature of the questioning," and "the use of physical punishment such as the deprivation of food or sleep"). (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.)

"[A] statement is involuntary and inadmissible when the motivating cause of the decision to speak was an express or clearly implied promise of leniency or advantage." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.) " 'Mere advice or exhortation by the

police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or a promise . . . does not . . . make a subsequent confession involuntary.' " (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1401.) The police may point out benefits that "flow[] naturally from a truthful and honest course of conduct," but if they suggest that the defendant "might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible." (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

"On appeal, we uphold the trial court's findings of historical fact, but we independently review its determination that defendant's statements were voluntary." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1402-1403.)

Examining the totality of the circumstances, we agree with the trial court's conclusion that Sanchez's confession was not made as a consequence of, nor was it influenced by, false promises of leniency. In the context of the interview, each of the comments which Sanchez has identified are, in essence, nothing more than platitudes about the merits of taking responsibility for one's actions. There were no promises, implied or express, of leniency from prosecutors or the court if he confessed to killing Sandoval. At no point in their interrogation did Martinez or Jorgenson suggest they would intervene with the district attorney on Sanchez's behalf if he confessed. Calling on Sanchez's experience as a parent and reflecting how parents want their children to take responsibility for their misconduct was not tantamount to a promise that the criminal justice system would treat Sanchez more leniently in any particularized way, e.g., a lesser charge or lighter sentence if convicted. The context surrounding each of these comments reveals that the detectives were referring only to the "peace of mind defendant and others would have after he did the right thing and gave his side of the story. That is not coercion." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1212.)

"[W]hen law enforcement officers describe the moral or psychological advantages to the accused of telling the truth, no implication of leniency or favorable treatment at the hands of the authorities arises." (*People v. Carrington* (2009) 47 Cal.4th 145, 172 (*Carrington*).) In *People v. Jackson* (1980) 28 Cal.3d 264, 299, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, footnote 3, the California Supreme Court determined that an officer's "statement that defendant would 'feel better' if he confessed" did not constitute "any promise of benefit other than the psychological benefit which 'flows naturally from a truthful and honest course of conduct.' " (*People v. Jackson*, *supra*, at p. 299.)

As the California Supreme Court has recognized, " '[t]he compulsion to confess wrong has deep psychological roots, and while confession may bring legal disabilities it also brings great psychological relief.' (*People v. Andersen* (1980) 101 Cal.App.3d 563, 583-584, fn. omitted.)" (*Carrington*, *supra*, 47 Cal.4th at p. 176 [detective's comments that sought to "evoke defendant's better nature by persuading her that 'purg[ing] it all' was morally the right thing to do and would provide her with psychological relief" was not coercive].) As in *Carrington*, the detectives here did not suggest to Sanchez they could influence the prosecution or the court, but "simply informed defendant that full cooperation might be beneficial in an unspecified way." (*Id*. at p. 174.)

Sanchez further argues, citing *People v. Johnson* (1969) 70 Cal.2d 469, that he construed Martinez's comments as promises of leniency because he was "unskilled and uncounseled in the law." (*Id*. at p. 479.) In *Johnson*, the interrogating officer told the defendant that he should be truthful because otherwise a jury would be more likely to send him to the gas chamber. (*Id*. at p. 478.) The California Supreme Court agreed with the defendant that the officer's statements were "more than merely pointing out to a suspect that which flows naturally from a truthful and honest course of conduct." (*Id*. at p. 479.) "To someone unskilled and uncounseled in the law it might have offered a hope that since no money was taken in the robbery and if, as he claimed he did not do the

shooting, that he might be cleared of any serious charges. Because of the felony-murder rule his statements amounted to a confession of first degree murder (see Pen. Code, § 189). It stretches the imagination to believe that he knowingly and intelligently waived his right to be free from self-incrimination." (*Ibid*.)

However, *Johnson* is readily distinguishable, as the result in that case did not turn merely on the officer's statements during the interrogation, but also on defective *Miranda*[15] warnings, the defendant's youth and lack of criminal history. Sanchez does not suggest he was not effectively *Mirandized* and, while he may have been a young man at the time of Sandoval's murder, he was not at the time he confessed to the detectives.

Furthermore, Sanchez's own testimony at trial regarding his confession made no mention of offers of leniency or his lack of education or knowledge of the legal system. Rather, he testified he was drunk and confused during the interview, and the officers "didn't tell me what they really wanted to know." According to Sanchez, it was his intoxication, coupled with the confusing and shifting line of inquiry posed by detectives that brought about his confession. We agree with the trial court that Sanchez's confession was voluntary.

E. Johnson's opinion on time of death

Sanchez argues the trial court abused its discretion when it ruled that Jardine was qualified to offer an opinion on the time of Sandoval's death. We disagree.

1. Relevant factual background

During Jardine's direct examination, the trial court sustained defense counsel's objection that no foundation had been laid for him to proffer an opinion on time of death. The prosecutor subsequently inquired into Jardine's qualifications, eliciting testimony that he had taken two homicide investigation courses through the Department of Justice and attended various seminars. Jardine also testified he had discussed the issue with

[15] *Miranda v. Arizona* (1966) 384 U.S. 436.

Dr. Simard and another pathologist with whom he worked. In estimating time of death, Jardine testified he looked for lividity and rigor mortis in the corpse, and explained how those physical processes inform that estimate.

During defense counsel's voir dire, Jardine acknowledged that one of two Department of Justice homicide investigation courses he took consisted of a two-week class which covered many topics besides rigor mortis. Over renewed objection, the trial court recognized Jardine "as an expert in determining time of death."

2. Applicable legal standards

In order to testify as an expert, a witness must have special knowledge, skill, experience, training or education in the subject area of his proposed testimony. (Evid. Code, § 720, subd. (a).) "Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (*Ibid*.) In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited. (*People v. King* (1968) 266 Cal.App.2d 437, 445.) It is left to the trial judge's discretion to determine if that standard has been met. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.)

A trial court has broad discretion in deciding whether to admit or exclude expert testimony, and its decision will not be reversed on appeal unless a manifest abuse of discretion is shown. (*People v. McDowell* (2012) 54 Cal.4th 395, 426; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299; *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001.) Expert testimony is admissible on any subject sufficiently beyond common experience such that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Brown* (2004) 33 Cal.4th 892, 905.)

3. Analysis

In this case, Jardine's expert qualifications were arguably minimal, but the topic on which he was asked to testify did not require more training and experience than he possessed. Jardine testified that lividity is the settling and coagulation of blood which

occurs after death. Rigor mortis is a process in which the corpse's muscles contract, rendering the body stiff. According to Jardine, lividity and rigor mortis become set about 12 hours after death, with some variation due to ambient temperature. Sanchez offered no contrary evidence to show that Jardine's understanding of the physical processes of lividity and rigor mortis were incorrect. In fact, Dr. Hain testified in accordance with Jardine, i.e., full rigor mortis with fixed lividity is typically seen about 12 hours after death.

Thus, Jardine possessed the necessary qualifications to render an opinion on time of death, and the trial court did not abuse its discretion in qualifying him as an expert on that topic. His comparative lack of qualifications as a forensic pathologist would go to weight of the evidence, not its admissibility.

Assuming arguendo the trial court erred in permitting Jardine to opine on time of death, this was an error of state law, and we apply the *Watson* test for harmless error. Under that test, it is clear that, even if all the evidence regarding time of death were somehow to be tainted by Jardine's testimony, it is not reasonably likely the jury would have reached a different verdict. The forensic evidence in this case, including evidence regarding the time of death, was not essential. Sanchez admitted shooting Sandoval, and there was ample evidence that Sanchez acquiesced when Octavio implicated him in Sandoval's murder. Multiple witnesses, including Sanchez, testified that Sanchez drank a great deal the day and evening of the murder, and that he and Sandoval fought multiple times that day, with Sandoval even breaking Sanchez's nose.

G. No cumulative error

Sanchez's argument that the cumulative effect of the purported errors discussed above warrants reversal. A claim of cumulative error "is in essence a due process claim." (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Here, we are satisfied that Sanchez received due

process and a fair trial. As explained above, Sanchez has failed to show any prejudicial error that infringed his due process rights. Sanchez "was entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Sanchez's trial was fair, and his claim of cumulative error fails.

H. There was no Brady *error*

Sanchez's final argument related to his conviction is that the trial court erred in denying his postverdict motions based on a purported violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

1. Relevant factual and procedural background

The day after the jury returned its verdict, the district attorney's office informed defense counsel and the court it had recently discovered that Jardine had suffered two misdemeanor convictions in 1988 under section 647.6 for "annoy[ing] or molest[ing]" a child. Sanchez brought a motion to set aside the verdict and a motion for a new trial based on the failure to disclose Jardine's convictions. Both motions were denied.

The trial court denied Sanchez's motions for the following reasons: (1) had the convictions been disclosed prior to Jardine's testimony, it would not have permitted impeachment with those convictions under Evidence Code section 352; and (2) even if it had permitted the impeachment, Jardine's testimony had only "minimal relevance."

2. Applicable legal standards

Under *Brady, supra*, 373 U.S. 83, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) Accordingly, the state has a duty to disclose any favorable and material evidence even without a request. (*Ibid.*; *United States v. Bagley* (1985) 473 U.S. 667, 678; *In re Sassounian* (1995) 9 Cal.4th 535, 543.)

There are three elements to a *Brady* violation. First, evidence must be suppressed, either willfully or inadvertently. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1035.)

Second, the suppressed evidence must be favorable to the prosecution, meaning it "either helps the defendant or hurts the prosecution" (*In re Sassounian*, *supra*, 9 Cal.4th at p. 544) in that it is exculpatory or has impeachment value. (*Strickler v. Greene* (1999) 527 U.S. 263, 282 (*Strickler*).) Third, the suppressed evidence must be material, meaning there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley*, *supra*, 473 U.S. at p. 682.)

On appeal, a defendant has the burden to establish the elements of a *Brady* violation. (*Strickler*, *supra*, 527 U.S. at pp. 289, 291.) "Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review. [Citation.] Because the [trier of fact] can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence." (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1042.)

There is no dispute the first element of a *Brady* violation—suppression of evidence—is satisfied here. Although there is no suggestion the prosecution willfully withheld evidence from the defense, even an inadvertent failure to disclose is sufficient to establish this first element. (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1035.)

The other two elements of a *Brady* violation, i.e., whether the evidence was favorable to the defense and whether it was material to the verdict, require more in-depth analyses.

Sanchez argues the evidence was favorable, because it would have impeached Jardine's testimony about the time of Sandoval's death. (*Strickler*, *supra*, 527 U.S. at p. 282.) Generally, misconduct that does not result in a felony conviction can be admissible to impeach a witnesses' credibility if it involves moral turpitude, because it has " ' "some tendency in reason" [citation] to shake one's confidence in [the witness']

honesty.' " (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) " ' "Moral turpitude" means a general " 'readiness to do evil' " [citation], i.e., "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." ' " (*People v. Sanders* (1992) 10 Cal.App.4th 1268, 1272.) Evidence of past misconduct amounting to a misdemeanor and involving moral turpitude is admissible to impeach a witness in a criminal case, subject to exclusion under Evidence Code section 352. (*People v. Wheeler*, *supra*, at pp. 295-296.)

Jardine's convictions fall into the category of impeachment evidence arising from acts of moral turpitude. Annoying or molesting a child under the age of 18, a violation of section 647.6, and any charge involving child molestation is a crime of moral turpitude. (*People v. Massey* (1987) 192 Cal.App.3d 819, 823.) As a result, the evidence was arguably "favorable" to Sanchez's defense in that it conceivably could impeach Jardine's testimony. However, it is the last element of a *Brady* violation—materiality—that Sanchez cannot establish.

"Materiality . . . requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' " (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1043.) " 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citations]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony." ' " (*Id.* at p. 1050.)

In *People v. Letner and Tobin* (2010) 50 Cal.4th 99 (*Letner*), the California Supreme Court determined that the prosecution's failure to turn over evidence of a witness' outstanding warrant for a misdemeanor petty theft charge and two pending criminal matters for writing bad checks and theft of clothing were not material under *Brady*. (*Id*. at pp. 174-175, 177-178.) In *Letner*, the witness at issue did not provide the only evidence linking the defendant to the crime. (*Id*. at pp. 176-177.) However, the *Letner* court determined that even if it were to conclude the witness' testimony constituted a critical element of the prosecution's case, it "would agree with the trial court's assessment that the undisclosed information concerning [the witness'] pending criminal matters would not have undermined her credibility to any significant degree." (*Id*. at p. 177.)

The *Letner* court observed that "none of the charges against [the witness] was particularly serious, and therefore the jury might not have found compelling the theory that [the witness] perjured herself at defendants' capital trial in order to obtain some relatively minor benefit in her own pending matters. In addition, the possibility that the charges would have had material impeachment value is contradicted by [the witness'] declaration submitted with the opposition to defendants' motions for new trials, in which she stated she did not speak with the prosecutor about the pending charges, did not expect or receive any benefits for testifying, did not alter her testimony as a result of the pending matters, and had requested (and the court had ordered) that her jail sentence be suspended so she would not be in jail while defendants also were incarcerated there." (*Letner*, *supra*, 50 Cal.4th at p. 177.)

Moreover, the *Letner* court noted that "misdemeanor *convictions* are inadmissible under the hearsay rule and furthermore, with reference to the underlying *facts* of misdemeanor offenses, that trial courts retain the authority to exclude such evidence under section 352 of the Evidence Code if presentation of those facts would create undue

prejudice, delay, or confusion, substantially outweighing their probative value." (*Letner, supra,* 50 Cal.4th at p. 178.)

Similarly, the only evidence of Jardine's misconduct that could have been disclosed to the defense prior to Sanchez's trial was his 1988 misdemeanor convictions for annoying or molesting a minor. As previously noted, evidence of conduct involving moral turpitude may be admissible for impeachment purposes. However, it is equally true that such evidence may be subject to exclusion under Evidence Code section 352. Evidence of misdemeanor conduct in particular may be *more* subject to exclusion, because "a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony" (*People v. Wheeler, supra*, 4 Cal.4th at p. 296), and its use at trial "entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present." (*Ibid*.)

In this case, the evidence had little probative value. Jardine's misconduct involved an entirely collateral incident that had no apparent relation either to his investigation of a homicide scene or his work as a coroner's investigator. Therefore, the trial court would have acted well within its discretion in excluding the evidence of his convictions for impeachment purposes.

Additionally, Sanchez has not shown there is a reasonable possibility disclosure of the suppressed evidence would have produced a different verdict. (*Strickler, supra,* 527 U.S. at p. 289.) Sanchez claims the probative value of this evidence bore on Jardine's qualifications and training to render expert opinion" and apparently these convictions would have led the trial court to not qualify Jardine as an expert on the time of death and would have led the jury to question his credibility on that subject. However, this is not a situation where Jardine's offenses, which took place many years before the trial, could somehow cast doubt on his ability to estimate time of death based on the condition of Sandoval's body when he examined it. Nor is this a situation where the impeachment material contradicts a crucial part of Jardine's testimony. Jardine's criminal case was

concluded long before Sanchez's trial so it is inconceivable that he testified in way that implicated Sanchez in exchange for any leniency in that case. Jardine's misdemeanors were stale, unrelated to his testimony in any way and therefore had minimal, if any, impeachment value.

Moreover, Jardine's testimony was corroborated by other evidence. Contreras testified Sandoval's body was stiff when he tried to turn him over a few hours before Jardine arrived at the scene. Dr. Hain independently established the time of death. Moreover, the issue of time of death was not determinative because there was ample independent evidence implicating Sanchez in Sandoval's death.

In short, we are unconvinced that if this evidence was disclosed prior to or during trial, it is reasonably probable Sanchez would have received a different result. (*People v. Salazar, supra*, 35 Cal.4th at p. 1043.) We therefore reject Sanchez's claim of *Brady* error.

I. Restitution fines

At sentencing, the trial court imposed a "restitution fund fine of $4000" pursuant to section 1202.4, subdivision (b). In addition, the court imposed an "additional restitution fund fine in that same amount" though this fine was suspended "pending successful completion of parole." Finally, the court ordered direct victim restitution "in an amount to be determined by the probation officer" under section 1202.4, subdivision (f). The record does not reflect the amount of victim restitution, if any, Sanchez was ultimately ordered to pay.

Sanchez argues that, because sections 1202.4 and 1202.45 were not in effect at the time of the commitment offense, the three fines imposed under those sections are barred by the prohibition against ex post facto laws. The People expressly concede that the trial

court erred in imposing fines under section 1202.4,[16] but argue that the matter should be remanded to the trial court for consideration under the restitution statute in effect at the time of the offense, namely former Government Code section 13967, subdivision (a). (Stats. 1981, ch. 102, § 54, p. 710.)

The parties agree section 1202.4 was only enacted in 1983 and thus was not operational when Sanchez murdered Sandoval in 1982. (Stats. 1983, ch. 1092, § 320.1.) "A restitution fine qualifies as punishment for the purposes of the prohibition against ex post facto laws." (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30; *People v. Souza* (2012) 54 Cal.4th 90, 143.) Sanchez's failure to object to imposition of these fines does not preclude him from raising them for the first time on appeal. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.) Accordingly, the fines imposed under section 1202.4, subdivisions (b) and (f) must be stricken *unless* there was a statute in effect at the time of the commitment offense that would support them. As shown below, there was a statute supporting imposition of a restitution fine but no statute providing for direct victim restitution.

Former Government Code section 13967, subdivision (a) was the law in effect at the time of the offense. That statute provided, as follows: "Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of

[16] The People did not address the fine imposed but suspended under section 1202.45, first enacted in 2004. (Stats. 2004, ch. 223, § 3.) As there appears to have been no similar statute in effect in 1982 when Sandoval was murdered, we will direct the trial court to strike that fine upon remand.

at least ten dollars ($10), but not to exceed ten thousand dollars ($10,000)." (Stats. 1981, ch. 102, § 54, p. 710.) This statute provides for a means of imposing a restitution fine, and therefore supports an order of restitution assuming the trial court makes the necessary findings relating to Sanchez's ability to pay and the potential economic hardship of a fine on his dependents. Accordingly, the matter is remanded to the trial court to make the necessary findings. (See *People v. Barker* (1986) 182 Cal.App.3d 921, 943-944.)

However, former Government Code section 13867 makes no provision for ordering direct victim restitution. Accordingly, the trial court's imposition of victim restitution under section 1202.4, subdivision (f), has no statutory antecedent and that fine must be stricken.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for the limited purpose of deciding whether to impose a restitution fine under the law in effect at the time of the offense, specifically former Government Code section 13967, subdivision (a). The trial court is further directed to strike the fines imposed under Penal Code sections 1202.4, subdivision (f) and 1202.45.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.